Supreme Court, U.S.
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No. 99-1927

In the

Supreme Court of the United States

DAYTON HUDSON CORPORATION, NOW KNOWN AS TARGET CORPORATION,

Petitioner,

vs

LAURA HOLLISTER, AMERICAN COMMUNITY MUTUAL INSURANCE COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF

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I. THE SIXTH CIRCUIT VIOLATED THE PRINCIPLES OF *ERIE RAILROAD CO. v. TOMPKINS*, 304 U.S. 64 (1938), WHEN IT ADOPTED A RULE OF LAW THAT THE MICHIGAN SUPREME COURT HAD EXPRESSLY REJECTED.

Plaintiff does all that she can in her response to confuse the issues raised in the petition of Target Corporation (previously known as Dayton Hudson Corporation and referred to in this reply as "Hudson's"). Hudson's can best straighten things out by first noting what Plaintiff does not argue. She does not dispute that this case implicates important federalism concerns. She does not dispute that in this case *Erie*'s importance justifies review. She does not dispute that the need for uniform guidelines in ascertaining state law justifies review. Instead, she confines her opposition to a single argument: the Sixth Circuit's decision was consistent with Michigan law because it permitted recovery in failure-to-warn claims without proof of negligence. Plaintiff's only argument is plainly wrong.

The fallacy in her argument is exposed by an overview of Michigan product liability law. Michigan recognizes two theories of recovery in this context, negligence and breach of implied warranty. Michigan also recognizes three types of claims that can be brought under either theory: manufacturing defect, design defect, and failure to warn. The required proof varies according to the nature of the claim asserted. This case centers on a failure-to-warn claim brought under an implied warranty theory – and only that law is pertinent.

Although Michigan courts distinguished in the distant past between negligence and implied warranty theories, modern courts have eliminated this distinction in failure-to-warn claims. The Michigan Supreme Court in 1979 merged the two theories. In *Smith v. E.R. Squibb & Sons, Inc.*, 273 N.W.2d 476, 480 (Mich. 1979), the court held that failure-to-

warn claims under either negligence or implied warranty theories "involve identical evidence and require proof of exactly the same elements," namely "reasonable care under the circumstances." *Squibb* involved a manufacturer, not a seller. The Michigan appellate court, however, broadened *Squibb*'s holding almost ten years later to include non-manufacturing sellers as well as manufacturers in *Coy v. Richard's Industries, Inc.*, 428 N.W.2d 734, 738 (Mich. Ct. App. 1988), *appeal denied*, 432 Mich. 856 (1989). Thus, as of 1988, Michigan no longer recognized a distinction between theories of implied warranty and negligence in claims of failure to warn, regardless of whether the action was brought against a manufacturer or non-manufacturing seller.[1]

With the *Squibb* court's merger of the theories of negligence and implied warranty for claims of failure to warn, the question remained how a defendant's reasonable care was to be evaluated. The Michigan Supreme Court answered this question in 1992 when it published the second of its two decisions in *Glittenberg v. Doughboy Recreational Industries.*, 491 N.W.2d 208 (Mich. 1992). In a case involving failure-to-warn claims under implied warranty and negligence theories against both manufacturers and sellers, the *Glittenberg* court defined reasonable care in accordance with the principles of Section 388 of the Restatement (2d) of Torts. In completing its gloss on failure-to-warn claims, the *Glittenberg* court made two key rulings. First, it applied Section 388 to both manufacturers and non-manufacturing sellers, like retailers. Second, it applied Section 388 to

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[1] In 1995, the Michigan Supreme Court reaffirmed the continuing vitality of the *Squibb* decision. *See Gregory v. Cincinnati, Inc.*, 538 N.W.2d 325, 329 & n. 9 (Mich. 1995). For this reason, Plaintiff's argument that the Michigan Supreme Court's 1984 decision in *Prentis v. Yale Manufacturing Co.*, 365 N.W.2d 176 (Mich. 1984) somehow overruled *Squibb* is nonsensical.

failure-to-warn claims under both negligence and implied warranty theories.

In adopting a unified reasonable care standard for failure-to-warn claims under negligence and implied warranty theories, the Michigan Supreme Court has steadfastly refused to recognize strict liability, absolute liability or any other kind of liability without fault. *See Hickey v. Zezulka*, 487 N.W.2d 106, 122 n.11 (Mich. 1992) ("[T]his Court has not adopted the doctrine of strict products liability."). Plaintiff does not dispute this proposition. Instead, she argues that the Sixth Circuit did not adopt strict liability or liability without fault. She bases her assertion on the court's failure to use the words "strict liability" or "liability without fault." Plaintiff elevates form over substance. The Sixth Circuit actually said that a retailer may be held liable "even if the retailer's conduct is wholly free from negligence." (Pet. Cert. App. at 10a.) It is hard to see how holding a retailer liable even though wholly free from negligence is anything other than liability without fault. Setting aside whether Plaintiff's argument is mere semantics, the simple truth is that the Sixth Circuit held that Hudson's could be liable without proof of negligence when the *Glittenberg* decision demands that Hudson's be held liable only with very specific proof of negligence.

Plaintiff's heavy reliance on the decisions in *Piercefield v. Remington Arms Co*, 133 N.W.2d 129 (Mich. 1965), and *Prentis v. Yale Manufacturing Co.*, 365 N.W.2d 176 (Mich. 1984), is misguided. *Piercefield* involved a claim of manufacturing defect, and thus has no relevance to this failure-to-warn case. *Prentis* pertains to Michigan's rejection of strict liability and its adoption of the risk-utility test for all design defect claims. Because both the original and amended opinions concluded that Plaintiff failed the risk-utility test it is difficult to see how the case helps her.

In short, Plaintiff argues only that this Court should deny Hudson's petition only because the Sixth Circuit's decision was consistent with Michigan law. In fact, the Sixth Circuit's

decision is contrary to both the letter and spirit of Michigan law. Given the uniqueness of Michigan's product liability law, the Court should grant the petition to protect Michigan's sovereignty and prevent forum-shopping. Given *Erie*'s undeniable importance, the Court should also grant the petition to issue uniform guidelines that will prevent this kind of injustice from arising in the future.

II. THE SIXTH CIRCUIT CONSIDERED NEW EVIDENCE ON REHEARING

Plaintiff does not challenge the rule that an appellate court cannot consider new evidence, not part of the record, on rehearing. Rather, she argues that the Sixth Circuit did considered new evidence on rehearing because it never said it was doing so. Plaintiff's argument is misplaced.

In its original opinion, the Sixth Circuit court observed that plaintiff's case "basically rests" on her expert's tests. (Pet. Cert. App. at 22a-11.) After examining all of her proof about the tests, it characterized them as "questionable" because they were not conducted under "conditions more like those in Hollister's apartment." (*Id.*) In reaching this conclusion, the court considered and rejected the very same evidence discussed in Plaintiff's original petition for rehearing with the exception of the affidavit. (*Id.*) In its amended opinion, by contrast, the panel characterized the tests as "credible." (*Id.* at 19a.) The only discernible reason for this about-face was the addition of the affidavit attached to Plaintiff's rehearing petition.

Plaintiff now asserts that there was more than enough evidence in the record to show that the tests were conducted under conditions like those at the time of the accident. She points to no such evidence. Certainly the amended opinion identified no such evidence. Indeed, there is no such evidence.

There is a larger concern. Hudson's never had a chance to move to strike the affidavit or question its legitimacy. This

would have been prevented if the court had provided Hudson's with minimum due process. The great virtue of due process is the litigant's certainty that they have been heard and their positions considered. This Court should grant certiorari to establish the minimum requirements for due process on rehearing so that all litigants can enjoy this certainty.

III. THE SIXTH CIRCUIT VIOLATED HUDSON'S DUE PROCESS RIGHTS ON REHEARING.

Because Fed. R. App. P. 40(a)(3) does not provide an absolute right to respond to a petition for rehearing, Plaintiff argues that Hudson's had no due process rights at any stage of the rehearing process. Plaintiff's argument does more to obscure, than clarify, this issue. Hudson's does not claim that Rule 40(a)(3) permits a response to every petition for rehearing. But there is a clear distinction between a decision to rehear and a change in final disposition. In those cases, undoubtedly many, where the decision to grant or deny rehearing is free from doubt, the court should be spared the burden of more paperwork. The demands of due process become imperative, however, once the court decides to rehear the case.

As soon as the court decides to rehear the matter, but before a change in the final disposition, both parties are entitled to notice of the issues under reconsideration and an opportunity to be heard. This is more than a matter of fairness to the litigants; it is also a matter of fairness to the court. By notifying the parties and providing an opportunity to be heard, the court gives them a chance to bring additional matters of fact or law to its attention. This becomes especially important as not all appellate courts receive the complete record from the trial court.

This is not to say that the grant of every petition for a rehearing must necessarily be accompanied by a round of briefs on the issues under reconsideration. In those instances

where an intervening decision by this Court has definitively changed the applicable law, more briefs would be completely unnecessary. *See United States v. Allegheny-Ludlom Indus., Inc.*, 568 F.2d 1073 (5th Cir. 1978) (no response to petition for rehearing before final disposition given intervening definitive Supreme Court decision). But this should be the exception, rather than the rule. Absent some extraordinary circumstance like that found in *Allegheny-Ludlom*, due process requires that the grant of a petition for rehearing be followed by notice to the parties of any issue under reconsideration and a meaningful opportunity to be heard on it. Due process also requires that this occur before any change in final disposition.

Due process never permits what happened in the present case. The Sixth Circuit – on its own initiative – deprived Hudson's of a final judgment without providing notice or the opportunity to be heard on the issue under reconsideration. This Court should grant certiorari so that no future litigant's judgment is taken away without due process.

IV. THE SIXTH CIRCUIT CONSIDERED ON REHEARING A THEORY THAT PLAINTIFF HAD ABANDONED

Plaintiff completely misunderstands Hudson's waiver argument. Hudson's never said that she abandoned her failure-to-warn claim. Instead, Hudson's argued that she abandoned all claims under an implied warranty theory because Plaintiff never included an implied warranty theory in the Pretrial Order.

Plaintiff's excerpts do not refute this conclusion. In the section on contested legal issues, Plaintiff listed, "Did Dayton Hudson have a duty to warn as to the specific nature and magnitude of the risk associated with the clothing it sold?" (Final Joint Pretrial Statement at C-2.) By using the phrase "magnitude of the risk," she was referring to Michigan's risk-utility test. Given that both she and the Sixth Circuit

concluded that her failure-to-warn claim under an implied warranty theory should not be judged by the risk-utility test, it is difficult to see how a reference to that test would preserve any claim under an implied warranty theory.

A similar argument holds for the other excerpt. Hudson's listed as one of its contested legal issues, "Did Hudson's have a duty to warn of the risk that clothing burns?" (*Id.*) On its face, this says nothing about a claim under an implied warranty theory. Indeed, Plaintiff does not contend to the contrary.

Regardless of whether the Sixth Circuit decided the abandonment question or remanded to the trial court on this issue, Hudson's was entitled to be heard. Simple fairness should require it and no harm can come from it. By not asking for briefs from the parties before reversing itself, the Sixth Circuit created precisely the kind of opportunity for error that the rehearing procedure was designed to prevent. This Court should grant this petition and establish the minimum due process requirements on appellate rehearing.

CONCLUSION

The federalism concerns underlying *Erie* and the need for guidelines in ascertaining state law merit the Court's review. Hudson's petition, however, does not stand or fall on these considerations alone. Each year this Court receives thousands of petitions for a writ of certiorari. As the number increases, the chance for review declines. Thus, to an ever-increasing extent, the courts of appeal are courts of last resort. This means that a petition for rehearing is frequently a litigant's last chance for justice. This Court's establishment of minimum due process requirements will go a long way towards ensuring that this last chance is not an empty one.

For the foregoing reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

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